No. 87-1387

In The
Supreme Court of the United States
October Term, 1987

WARDS COVE PACKING COMPANY, INC.,
CASTLE & COOKE, INC.,

Petitioners,

v.

FRANK ATONIO, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CENTER FOR CIVIL RIGHTS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

ARTHUR H. ABEL
FAEGRE & BENSON
2200 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402
(612) 336-3000

CLINT BOLICK*
JERALD L. HILL
MARK J. BREDEMEIER
LANDMARK LEGAL FOUNDATION
CENTER FOR CIVIL RIGHTS
107 Second Street, N.E.
Washington, D.C. 20002
(202) 546-6045

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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INTEREST OF AMICUS CURIAE

The Landmark Legal Foundation Center for Civil Rights is a public interest law center dedicated to promoting the core principles of civil rights: equality under law and fundamental individual liberties. A vital aspect

of this mission is defending the integrity of civil rights laws in order to give meaning to the precious popular consensus expressed in those laws.

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SUMMARY OF ARGUMENT

In *Watson v. Fort Worth Bank and Trust*, — U.S. —, 108 S.Ct. 2777 (1988), this Court extended the statistical principles behind the adverse impact theory to reach subjective employment practices under Title VII. That extension, as carefully delineated in Justice O'Connor's plurality opinion, was entirely consistent with the basic principles established in prior Title VII cases, which historically defined just two types of analysis: the adverse impact and disparate treatment tests.

The vital contribution of the *Watson* plurality was to harmonize these two theories of proof, which previously were evolving in the lower courts in analytically inconsistent and sometimes contradictory ways. The *Watson* plurality demonstrates that just as there is but one objective in Title VII cases—to identify discriminatory employment practices—so is there a single coherent method of analysis, of which adverse impact and disparate treatment are distinct but overlapping variants.

The adverse impact theory merely describes a method of *prima facie* analysis based on the use of statistics. Although much of the dictum in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), is limited to the unique context of that case, its *prima facie* standards are transferable to

any case susceptible of proof by statistical inference. But because vague statistical challenges based on subjective decisionmaking have the capacity to "chill" an employer's nondiscriminatory personnel judgments, this Court should adopt the plurality's standards in *Watson* and apply them to this and other such cases.

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ARGUMENT

THE ANALYTICAL FRAMEWORK FOR ADVERSE IMPACT THAT THE PLURALITY ARTICULATED IN WATSON v. FORT WORTH BANK AND TRUST SHOULD BE APPLIED TO BAR RESPONDENTS' BROAD, ILL-DEFINED CHALLENGES TO PETITIONERS' BUSINESS DECISIONS

In *Watson v. Fort Worth Bank and Trust*, — U.S. —, 108 S.Ct. 2777 (1988), this Court held for the first time that the adverse impact theory for proving Title VII discrimination theoretically reached employment decisions based on subjective criteria. However, cognizant of the potential "chilling effect" that such an extension might have on legitimate business practices, the plurality carefully circumscribed that theory in order to keep it "within its proper bounds." *Id.* at 2788. The plurality's close examination of the theoretical foundations of Title VII's evidentiary burdens was rationally conceived and should be applied here—for the respondents advance sweeping, ill-defined claims of subjective discrimination, and take precisely the shotgun approach to litigation that *Watson's* careful analysis was intended to proscribe.

Indeed, it was this spectre of freewheeling litigation practice that the Bank in *Watson* raised, warning that a wholesale extension of the traditional adverse impact theory (outlined in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)) would engender an onslaught of nebuously framed civil rights claims, against which employers would find it impossible to defend without surreptiously adopting schemes for "preferential treatment." *See Watson*, 108 S.Ct. at 2786.[1]

This litigation problem was slight when the adverse impact theory was confined to the traditional *Griggs*-type scenario, where seemingly arbitrary (but facially neutral) objective "measuring devices" were involved.[2] But mind-

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[1] Indeed, one commentator complains that adverse impact has been applied indiscriminately "to cases arising out of vastly different factual contexts, making the burden of proving discriminatory effects weightless, and the [employer's] burden . . . onerous, at times impossible." Lerner, *Washington v. Davis: Quantity, Quality and Equality in Employment Testing*, 1976 Sup. Ct. Rev. 263, 267.

[2] *Griggs* involved the seemingly arbitrary use of standardized employment tests that were administered to all employees equally but which had a substantially adverse impact on the passage rate of blacks. In Chief Justice Burger's oft-quoted phrase, the facially neutral and otherwise objective tests were illegal under Title VII because they acted like "built-in headwinds" against minority groups and were "unrelated to measuring job capability." 401 U.S. at 432. *See also Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (written aptitude tests and diploma requirements); *Washington v. Davis*, 426 U.S. 229 (1976) (written test of verbal skills); *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (height and weight requirements); *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979) (rule against employing drug addicts); *Connecticut v. Teal*, 457 U.S. 440 (1982) (written examination).

During the period that these decisions were written, it is clear that the Court did not intend the *Griggs* analysis to apply

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ful that a mechanical extension of *Griggs* into the sphere of subjective decisionmaking would "lead in practice to perverse results" that were antithetical to Title VII's goal of employment opportunities based on qualifications,[3] the plurality in *Watson* carefully harmonized the traditional Title VII analyses of adverse impact and disparate treatment (outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

A. The Plurality's Opinion in Watson Properly Recognized that the Rationale Underlying Title VII's Evidentiary Burden is the Same for All Cases.

1. One of the breakthrough of the plurality's opinion in *Watson* was a more careful explication of the evidentiary considerations appropriate to proving discrimination through adverse impact. The prior absence of a unified adverse impact framework was particularly vexing in the area of subjective decisionmaking. Although the Court had gone far toward analyzing such cases in the past, *see, e.g., Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), it never previously considered how in this context the use of statistical data from the adverse impact theory should fit into the evidentiary scheme.

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fully outside of the narrow context of cases where employers allowed test results, or other "fixed measures," to control their personnel decisions. *See, e.g., Griggs*, 401 U.S. at 433, 436; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 n.14 (1973); *Dothard*, 433 U.S. at 340 (Rehnquist, J., concurring).

[3] To quote Senator Humphrey, "what [Title VII] does . . . is simply to make it an illegal practice to use race as a factor in denying employment. It provides that men and women shall be employed on the basis of their qualifications . . . ." 110 Cong. Rec. 13,088 (1964).

This problem has been a subject of enormous controversy through the years, and one that constantly has plagued both courts and commentators.[4] But we believe that the analysis of *Watson's* plurality does much to eliminate that confusion and to stake out the neutral principles on which future litigants may rely.

2. It now seems clear that, whatever the chosen method of proof, the Court views the "ultimate determination of factual liability" as truly the same for all civil rights cases. *United States Postal Service v. Aikens*, 460 U.S. 711, 718 (1983) (Blackmun, J., concurring). At bottom, the plaintiff must adduce sufficient evidence to imply and ultimately prove that a particular employment practice discriminates on the basis of race, color, gender, national origin, or religious preference. *See Aikens*, 460 U.S. at 715; *Watson*, 108 S.Ct. at 2790.

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[4] *See, e.g., Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1480-81 & n.1 (9th Cir. 1987) (en banc) (discussing the differing views throughout the Circuits); *id.* at 1491-92 & n.4 (five judges concurring) (similar discussion). One commentator, particularly frustrated with this state of affairs, has written:

> The trouble with [the "traditional"] categories of [Title VII's analysis] is that few cases with multiple plaintiffs fit neatly or exclusively into one category or the other. Most cases can be placed in either, and cases are now won or lost, depending upon the pigeonhole in which they are placed. The whole process begins to bear a disquieting resemblance to the bad old writ-of-action days when cleverness in juggling legal forms counted more heavily than the substance of the cases. This unfortunate impression is reinforced by the fact that the Court itself has begun to juggle the categories in arbitrary ways in order to get results it wants in particular cases.

Lerner, *Employment Discrimination: Adverse Impact, Validity, and Equality*, 1979 Sup. Ct. Rev. 17, 29-30 (footnote omitted).

Thus, in the first stage of all Title VII cases, a plaintiff who seeks to prove discrimination through an indirect showing must tender enough evidence to create a legal inference of discrimination. *See Teamsters v. United States*, 431 U.S. 324, 358 (1977). Although the precise formula often will vary according to the facts of each case,[5] the plaintiff must come forth with sufficient proof from which a reasonable fact-finder can infer causation. *See New York City Transit Authority v. Beazer*, 440 U.S. 568, 584 (1979).

If properly supported, this inference will attain the status of a legal presumption and will shift to the defendant the common law burden of rebuttal. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 & n.7 (1981). *See also* F. James & G. Hazard, *Civil Procedure* § 7.9, p. 225 (2d ed. 1977). At this "second stage," the employer must produce just enough admissible evidence to meet the presumption and create a "genuine issue of fact" as to whether an employment prastice is based on legitimate factors, *Burdine*, 450 U.S. at 254; is "reasonably related to the achievement of some legitimate goal," *Furnco*, 438 U.S. at 578; or otherwise has "a manifest relationship to the employment in question," *Griggs*, 401 U.S. at 432.[6]

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[5] *Compare McDonnell Douglas Corp. v. Green*, 411 U.S. at 802-03 *with Teamsters v. United States*, 431 U.S. 324, 340 (1977) (both cases stating that the nature of the evidentiary burdens, including the use of statistics, will depend on the particular facts involved).

[6] Of course, the employer need not actually convince the court that it acted for these reasons. *See Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 (1978). The evidentiary burden merely is designed to rebut the presumption of unlawful conduct and, thereby, "focus the issues" for the plaintiff's ultimate burden of proof. *See, e.g., Burdine*, 450 U.S. at 253.

3. The coherence and appeal of this neutral approach is obvious. But only recently has its efficacy become apparent. For a long time both courts and commentators were constrained by the outlines of *Griggs* and *McDonnell Douglas*, whose specific analytical guidance would not easily accommodate the potentially vast scope of subjective discrimination. As discussed below, these cases present variations within what should be one analytical continuum. However, because they were treated separately instead of together, Title VII's modes of analysis wrongly came to be viewed through a bipolar lens. This problem was exacerbated by the fact that the nature of the employer's evidence is controlled almost entirely by the evidence it seeks to rebut.

For example, in the traditional disparate treatment case, this Court has characterized the plaintiff's initial burden as simply to show that he was qualified, but rejected, for a job that someone similarly situated but outside of the protected Title VII class later received. This circumstantial showing raises an inference of unlawful discrimination. And, "if the employer remains silent in the face of the presumption, the court must enter judgment for the plaintiff because no issues of fact remain in the case." *Burdine*, 450 U.S. at 254 (footnote omittted).[7] The employer's burden on rebuttal, then, is to "raise[] a genuine issue of fact," *id.* at 254, by "articulat[ing] some legitimate, non-discriminatory reason" on which its subjective personnel decision was based. *Furnco*, 438 U.S. at 578.

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[7] The evidentiary test for creating a genuine issue of disputed fact is discussed generally in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254-55 (1986).

Turning to the traditional adverse impact case, one view is that the plaintiff must meet a higher initial burden than in the disparate treatment case, which the defendant then must "disprove." *See Watson*, 108 S.Ct. at 2792 (Blackmun, J., concurring). But there is no apparent reason for such a rule, except that it is an outgrowth of the unique facts in *Griggs*. The better view, analytically, and one suggested by *Watson's* plurality is that a plaintiff must make the *same* initial showing in both cases: to tender enough evidence from which a court reasonably may infer illegal discrimination "under [the] circumstances." *Burdine*, 450 U.S. at 253; *cf. id.* at 254 n.7. If this seems more difficult in the impact case, it merely is because statistical proof is so open to misuse that the law will not permit its admission unless (1) the proper foundation is made and (2) the impact is sufficiently "significant" that an inference of causation is reasonable. *See, e.g., Hazelwood School Dist. v. United States*, 433 U.S. 299, 310-13 (1977); *Teamsters v. United States*, 431 U.S. at 339-40.

Once this showing has been made and a presumption raised, the employer's evidentiary burden on rebuttal is identical to that required in a traditional disparate treatment case.[8] In short, the employer must justify its conduct by showing that its business practice "is reasonably related to the achievement of some legitimate goal," *Furn-*

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[8] *See Burdine*, 450 U.S. at 254 n.7 ("[I]n *the* Title VII context we use 'prima facie case' . . . to denote . . . only the establishment of a legally mandatory, rebuttable presumption . . . .") (emphasis added).

co, 438 U.S. at 578,[9] or otherwise is the product of some "business necessity," *Griggs*, 401 U.S. at 431. *See Watson*, 108 S.Ct. at 2790; *cf. Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (a traditional impact case relying on *McDonnell Douglas*, 411 U.S. at 802, to describe this "burden").[10]

In the usual case, meeting this obligation is fairly simple, because the targeted decisionmaking practice often will have a facially reasonable relationship to the job in question. *See Watson*, 108 S.Ct. at 2791. However, in cases like *Griggs*, where employers substitute arbitrary

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[9] The employer need not assume a burden of proof or a duty to persuade; rather, it merely must carry a burden of production—i.e., "of going forward with evidence . . . to meet the presumption." *See* Fed. R. Evid. 301. *See generally* 9 J. Wigmore, *Evidence* § 2491 (3d ed. 1940).

[10] Three Justices in *Watson* would cast the burdens somewhat differently. They would hold that in the traditional disparate treatment case the employer merely must "produce" rebuttal evidence, but that in a traditional adverse impact case it must "prove" a business justification. *Watson*, 108 S.Ct. at 2792. The problem with this analysis is that it is based on loose language, not cogent logic. In cases that pre-date *Watson*, this Court regrettably has used words like "proof" and "prove" to define the second stage of a Title VII inquiry, when the context of those cases reveals that the Court did *not* intend to give those terms their full technical sway. *See Burdine*, 450 U.S. at 254 n.7 (suggesting precisely this point "in *the* Title VII context") (emphasis added).

For example, in *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), the Court said that the employer's burden "is merely that of *proving* that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race." *Id.* at 577 (emphasis added). But three sentences later, the Court explained that this so-called "proof" only needed to "dispel the adverse inference." Therefore, "the employer need only *articulate* some legitimate, nondiscriminatory reason" for the decision. *Id.* at 578 (emphasis added) (citation omitted).

and seemingly unnecessary "employment tests" for their business judgment, it may in fact be more difficult for the employer to defend itself. This difficulty is *not* because the employer must "disprove" discrimination or otherwise meet a higher evidentiary standard. Rather, it is the natural consequence of justifying the rigid use of an employment test that appears unrelated to the job in question. *Cf. Griggs*, 401 U.S. at 431 (employer must show that its employment practice is "manifestly related to job performance").[11]

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[11] Much literature exists describing the notion of test "validation," to which the Court in dictum gave a passing nod in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 426-29 & n.23 (1975). *See generally* B. Schlei & P. Grossman, *Employment Discrimination Law* ch. 4 (2d ed. 1983). However, the *Watson* plurality specifically observed that, under this Court's prior holdings, "employers are not required . . . to introduce formal 'validation studies' showing that particular criteria predict actual on-the-job performance." *Watson*, 108 S.Ct. at 2790 (citing *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587 (1979) (flat rule against employing drug addicts upheld because the Court considered it obvious that "legitimate employment goals of safety and efficiency" were served), and *Washington v. Davis*, 426 U.S. 229, 250 (1976) (written test upheld because it was related to success at the police academy, "wholly aside from [the test's] possible relationship to actual performance as a police officer")).

This interpretation has been hailed as a rational legal approach by one lawyer-psychologist, who observes that:

> All recognized scientific validation methods require the use of elaborate, formal procedures which are difficult, time-consuming, and costly. . . . [In making their employment decisions, what most employers] have relied upon instead is what psychometricians call "face validity."
>
> Face validity is . . . a modern name for the basic, centuries-old standard of Anglo-American law—reasonableness—and business and factory managers are hardly the only

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B. The Plurality's Opinion in Watson Properly Adapted the Traditional Adverse Impact Theory to the Circumstances of Subjective Decisionmaking.

1. The traditional adverse impact test, as articulated in *Griggs*, was designed to discourage the use of "artificial, arbitrary, and unnecessary barriers to employment" that had an illegally discriminatory impact under Title VII. *Griggs*, 401 U.S. at 431. Moreover, *Griggs* was concerned mostly with curbing the use of "testing or measuring procedures," where employers gave such devices "controlling force" in the workplace. *Id.* at 436. In such cases, where employers abdicate their judgment to seemingly arbitrary measuring devices, ordinary deference to employer judgments does not necessarily attach. *See id.*

However, *Griggs* does not supplant an employer's right to make qualitative business judgments in the workplace. To the contrary, this Court recognized in *Griggs* that Title VII "expressly protects the employer's right to insist that any prospective applicant . . . must meet the

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> ones who rely upon it in selecting people for jobs. Face validity or reasonableness is what courts, legislatures, and the professions also rely upon when they insist that a law degree is required for the practice of law, a psychology degree for the practice of psychology, or training in education for the practice of teaching. These requirements have never been validated. They probably could not be validated. Face validity has simply been accepted and enforced on the basis of its *inherent plausibility* for jobs enumerated and for a myriad of other jobs for skilled workers, professional or nonprofessional, white collar or blue.

Lerner, *Employment Discrimination: Adverse Impact, Validity, and Equality*, 1979 Sup. Ct. Rev. 17, 18-19 (footnotes omitted) (emphasis added).

applicable job qualifications" that the employer selects. 401 U.S. at 434 (quoting 110 Cong. Rec. 7247 (1964) (memorandum of Sen. Case and Sen. Clark)). Moreover, this Court subsequently stated that:

> Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business. Those legislators demanded as a price for their support that "management prerogatives . . . be left undisturbed to the greatest extent possible." H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, p. 29 (1963).

United Steelworkers of America v. Weber, 443 U.S. 193, 206 (1979).

Thus, while Title VII was intended "to make it an illegal practice to use race as a factor in denying employment," it was not intended to encroach on the employer's right to manage its work force. *See* 110 Cong. Rec. 13,076-79 (1964) (discussion between Sen. Ervin and Sen. Cooper); 110 Cong. Rec. 13,080 (1964) (remarks of Sen. Humphrey).

2. The traditional adverse impact test outlined in *Griggs* simply does *not* reach purely subjective business judgments. However, there is no analytical proscription against using *Griggs'* statistical proof methods to challenge such judgments as discriminatory. After all, the neutral principles that drive Title VII's factual inquiry permit the use of any evidence from which a court reasonably may infer illegal discrimination "under the circumstances" of the case.

In the usual instance, subjective personnel judgments are particularly amenable to a disparate treatment analy-

sis. *See, e.g., Furnco Construction Corp. v. Waters, supra.* In some cases, however, it may be possible to make out an adverse impact claim, particularly where multiple plaintiffs challenge a specific subjective decisionmaking practice. In such cases, it is natural to seek initial guidance from *Griggs* and adopt its *prima facie* standard as a model for evaluating the plaintiffs' statistical evidence.

3. This is precisely what this Court did in *Watson*, when seven Justices agreed that a plaintiff who seeks to challenge an employer's subjective business judgment in making personnel decisions must do more than merely show that there are "statistical disparities in the employer's work force." 108 S.Ct. at 2788 (plurality opinion); *id.* at 2792 & n.2 (Blackmun, J., concurring). Instead, the plaintiff must:

> "isolat[e] and identify[ ]" each "specific employment practice" that allegedly is "responsible for any observed statistical disparities" in work force composition; and "offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused" the alleged harm "because of [the plaintiff's] membership in a protected group."

Id. at 2788-89 (plurality opinion).

Of course, the quantum of proof at this stage is not absolute. But as with all circumstantial evidence based on statistics, the "statistical disparities must be sufficiently substantial that they raise an inference of causation." 108 S.Ct. at 2789. In short, the disparity must suggest a "statistical significance," such that it is unlikely to have occurred merely by chance and, therefore, if unexplained, may reasonably imply discrimination.[12]

In rebuttal, the employer must "produce evidence that its employment practices are based on legitimate business reasons." *Watson*, 108 S.Ct. at 2790.[13] Usually this should only require the employer to identify a facially plausible business reason for its judgment. *Cf. Dothard v. Rawlinson*, 433 U.S. at 340 (Rehnquist, J., concurring) (the employer in an impact case must "articulate the asserted job-related reasons underlying the [practice]"). *See* note 11 *supra* and accompanying text. It then falls to the plaintiff to prove a Title VII violation by showing that there exist other, less discriminatory decisionmaking practices that fulfill the employer's "business goals" equally as well, and at no greater cost or burden than the challenged practice. *See Watson*, 108 S.Ct. at 2790.

4. These carefully prescribed factors properly strike the balance mid-way along the continuum between what

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12 *See, e.g., Griggs*, 401 U.S. at 426 (the employment test had to "operate to disqualify Negroes at a *substantially* higher rate than white applicants") (emphasis added); *Albemarle*, 422 U.S. at 425 (plaintiffs were required to show "that the tests in question select[ed] applicants . . . in a racial pattern *significantly* different from that of the pool of applicants") (emphasis added); *Dothard*, 433 U.S. at 329 ("plaintiff need only show" that fixed standards "select[ed] applicants for hire in a *significantly* discriminatory pattern") (emphasis added); *Teal*, 457 U.S. at 446 ("*significantly* discriminatory impact") (emphasis added).

13 Of course, before proceeding with this evidentiary stage, the employer may challenge the statistical premise of the *prima facie* case, and undermine any statistical inferences of causation. *See Dothard v. Rawlinson*, 433 U.S. 321, 331 (1977); *Hazelwood School District v. United States*, 433 U.S. 299, 309-312 (1977).

traditionally has been called an adverse impact case (based on standardized tests or other fixed criteria) and a disparate treatment case (based on impermissible subjective criteria). In this middle ground, where amorphous qualities of subjective judgment come into play, it is especially important for this Court to guide both lower courts and litigants in the legal standards necessary to apply a *Watson*-type analysis. For these reasons, we believe that the Court should adopt as its holding the plurality's opinion in *Watson* and apply that analysis to the present case.

C. The Ninth Circuit's Decision Reversing the Trial Court's Judgment for Petitioners Conflicts with the Plurality's Opinion in Watson.

Turning to the current case, respondents attempted at trial to show that one or more of about sixteen challenged employment practices, either separately or together, violated Title VII.[14] After multiple appeals, the Ninth Circuit selected several practices as potential subjects for an adverse impact challenge: word-of-mouth recruitment, nepotism, separate hiring channels, housing messing and race labeling. *Atonio v. Wards Cove Packing Co.*, 827 F.2d 439, 444-49 (9th Cir. 1987). Such broad, nebulous claims simply should not be allowed. In order to foster meritorious litigation and present an orderly case for trial, challenges to subjective decisionmaking must focus on the causative effects of "isolated" decisionmaking practices. Otherwise, "the only cost-effective means of avoiding expensive litigation" will be for employers to adopt illegal

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[14] Petition for Certiorari at 5-6 & n.3.

and pernicious "quotes and preferential treatment [policies]." *Watson*, 108 S.Ct. at 2788.

1. *Statistics.* Respondents are "unskilled" cannery workers. The Ninth Circuit found that they produced *prima facie* evidence of discrimination simply by tendering numerical data of segregation in the workplace, vis-a-vis "skilled" positions. *Atonio*, 827 F.2d at 444. The Court of Appeals relieved the respondents of any burden to prove that there actually existed minority individuals qualified for the skilled positions they challenged. Instead, it held:

> The statistics show only racial stratification by job category. This is sufficient to raise an inference that *some practice* or *combination of practices* has caused the distribution by race . . . .

827 F.2d at 444 (emphasis added).

The Ninth Circuit's holding does not comport with the corresponding test under *Watson*. First, evidence of "mere disparities in the employer's work force" will not establish a *prima facie* case. *Watson*, 108 S.Ct. at 2788; *id.* at 2797 & n.2 (Blackmun, J., concurring). Second, respondents' failure to "isolate" and "identify" the particular decisionmaking practice that *caused* the disparity is fatal to their case. *Id.* at 2788. They simply cannot allege a claim of adverse impact until they first identify a *specific* decisionmaking practice that causes discrimination. Finally, the Court of Appeals improperly relieved respondents of the obligation to show that minority individuals actually were qualified for the skilled jobs at issue.

2. *Specific Practices.* The Court of Appeals also reviewed petitioners' other claims of discrimination. However, respondents' failure to isolate specific objectionable decisionmaking practices, or produce statistical evidence sufficiently probative of causation based on race, renders their entire claim insufficient. At minimum, this Court should vacate the Court of Appeals' decision and remand for further findings in accordance with the plurality's analysis in *Watson*.

In so doing, this Court should stress the need for respondents to make a substantial statistical showing of discrimination as to each challenged employment practice. Moreover, petitioners have articulated legitimate business reasons for separate hiring channels (union versus non-union hiring),[15] informal recruitment (personal knowledge and hiring of skilled workers by application only),[16] separate messing facilities (culinary preference and union restrictions),[17] and separate housing facilities (seasonal requirements and workshift harmony).[18] Consequently, if respondents do establish a *prima facie* case, this Court should stress that to prevail they also must identify specific alternative practices that (1) fulfill the same business functions as the challenged practices, but that are neither (2) more costly or troublesome for the employer to implement, nor (3) needlessly intrusive of workplace management.

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[15] *Atonio*, 34 Empl. Prac. Dec. (CCH) 33,821, 33,827-28 (W.D. Wash. 1983) (findings 85-90, 94, 101-103).

[16] *Id.* at 33,827-28 (findings 87-89, 94); *id.* at 33,830 (findings 124-128).

[17] *Id.* at 33,836 (findings 143-147); *id.* at 33,844 (applying adverse impact test).

[18] *Id.* at 33,836 (findings 149A-149C); *id.* at 33,844 (applying adverse impact test).

3. *Nepotism.* Finally, we raise a special concern about nepotism. Single acts of nepotism are unlikely to be illegal. *Cf. DeCintio v. Westchester County Medical Center*, 807 F.2d 304 (2d Cir. 1986), *cert. denied*, — U.S. —, 108 S.Ct. 89 (1987) (rejecting Title VII claim where woman nurse was hired by her paramour, despite the presence of other qualified applicants). However, a nepotism policy or practice may be discriminatory where it is sufficiently pervasive. In such cases, the Ninth Circuit properly was concerned that if members of a predominant racial group hire only their own relatives, then "the practice necessarily has an adverse impact." *Atonio*, 827 F.2d at 445.

But in the current case, the trial court's finding of no discrimination should be sustained. The trial court found that "the [respondent's] nepotism figures failed to differentiate those persons who became related through marriage *after* starting work at the canneries." *Atonio*, 34 Empl. Prac. Dec. (CCH) 33,821, 33,840 (W.D. Wash. 1983) (emphasis in original). Moreover, the court found that "[r]elatives of whites and *particularly* nonwhites appear in high incidence at the canneries." *Id.* (emphasis added). Given these findings, it is difficult to see how respondents could possibly prove adverse impact because of race.

In sum, the evidence submitted by respondents at trial was insufficient to prove their adverse impact claim under any of this Court's prior holdings, and particularly under

the standards applicable to subjective decisionmaking that were articulated by the *Watson* plurality.

CONCLUSION

For the reasons expressed above, we believe that this Court should (1) reaffirm the plurality's suggestion in *Watson* that there exists a single analytical approach to deciding Title VII cases; (2) adopt the plurality's opinion as the proper mode of applying statistical evidence to subjective decisionmaking practices; and (3) vacate the decision below.

Respectfully submitted,

ARTHUR H. ABEL
FAEGRE & BENSON
2200 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402
(612) 336-3000

CLINT BOLICK*
JERALD L. HILL
MARK J. BREDEMEIER
LANDMARK LEGAL FOUNDATION
CENTER FOR CIVIL RIGHTS
107 Second Street, N.E.
Washington, D.C. 20002
(202) 546-6045

* Counsel of Record